No. 10298

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN H. MARSHALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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Statement of the Case.

An indictment was returned on July 30th, 1941, charging

HELEN MAY FAWKES;
LLEWELLYN F. MARSH;
ALBERT A. MARTINEZ;
CHARLES W. TALBOTT; and
NORMAN H. MARSHALL;

with a violation of Title 18, Section 338 and Section 88, United States Code. The indictment charged the defendants in ten counts with devising a scheme to defraud and the use of the United States mail of a great many persons, including those persons named as the ones to be defrauded by the sale of lease contracts, covering exclusive

territory for the use of a certain instrument known as a "Hotel Electrical Directory." The eleventh, or last count, in the indictment charged a conspiracy on the part of the defendants to use the mails of the United States in furtherance of a scheme to defraud. The indictment charges that the defendants would insert and cause to be inserted in the classified columns of newspapers throughout the United States, advertisements for resident managers in various localities, stating therein, that the business connection would be permanent and that the income would reasonably be $6,500 or more yearly, and that a cash deposit varying in amounts, ranging from $1,500 to $3,750 was required and would be secured and returnable;

That the defendants, under the name of DIRECT-U-SYSTEMS, would mail letters to the persons intended to be defrauded, who had responded to the advertisements, and acknowledged receipt of the reply and state that a representative would call to explain the proposition in person; that the proposition was not a promotional matter; that the Company had nothing to sell; that it desired to select a person interested in a permanent connection with yearly increases; that the Company must virtually guarantee the success of the person so selected; that when a franchise holder found it impossible to make the large earnings promised to him by the defendants and would demand the return of his money, theretofore deposited with the defendants to guarantee his success, the defendants would, under the name of DIRECT-U-SYSTEMS, refuse to return such deposit of money or any portion, thereof, but would

offer to give in lieu, thereof, a worthless document known as a "Repurchase Agreement", wherein they would agree to pay the franchise holder a percentage of any moneys received by the defendants from others in the same territory, whom the defendants might induce to take a franchise;

That DIRECT-U-SYSTEMS was a Corporation organized under the laws of the State of California; was a Company of good reputation, of high integrity, of unlimited credit standing, and the exclusive manufacture of electrical directories for display in the lobbies of hotels; that a person who would become a franchise holder would be given the exclusive right to install directories in his territory and to rent space to business concerns, thereon, at certain stipulated weekly, monthly, or yearly rates, and to keep all moneys so derived, with the exception of that portion agreed upon to be returned to the Company, as royalties and that the franchise holder would have large earnings.

The indictment further charges that the representations so made by the defendants were false and untrue and known by the defendants to be false and untrue; that defendants, at a prior time, under the name of NATIONAL DIRECTORY SYSTEMS had conducted a business almost identical in nature with that of the DIRECT-U-SYSTEMS, and that such business so previously conducted had failed and gone out of existence. The defendants represented to various persons that electrical directories had been successfully installed in the States of Washington and Oregon by the DIRECT-U-SYSTEMS, when in truth and in fact,

such directories had been installed by the NATIONAL DIRECTORY SYSTEMS and had failed of success to the knowledge of the defendants, prior to the time such representations were made.

At the conclusion of the presentation of the government's case, the Court directed a verdict of "Not Guilty" as to the defendant, FAWKES. The government dismissed Counts Six and Seven as to all defendants, and at the close of the case, Appellant was convicted upon all remaining counts. Judgment and Sentence were entered October 19th, 1942, and Appellant NORMAN H. MARSHALL is now presenting an Appeal.

Questions Involved.

Appellant has stated in his opening brief that the whole question presented upon the Appeal is whether or not Appellant Marshall was acting in good faith in such connection, as he had with the selling of leases upon the advertising devise, referred to in the indictment, in so far as all counts in the indictment, except Count Eleven, are concerned. We agree with that statement. As to Count Eleven, another and different question is involved.

POINT 1: Sufficiency of the evidence to establish that appellant was not acting in good faith in the sale of leases upon the advertising devise, described in the indictment.

POINT 2: Sufficiency of the evidence to establish a conspiracy by the defendants to use the mails in furtherance of a scheme to defraud.

The Facts.

The uncontradicted evidence taken at the trial shows that appellant and his co-defendant had previously conducted a similar business under the name of NATIONAL DIRECTORY SYSTEMS; that efforts had been made at numerous places in the United States to sell franchises to various persons, and that many sales had been made; that the advertising devise was very similar in appearance and operation to a devise as used by DIRECT-U-SYSTEMS, as shown by defendants' Exhibit Z. Z. [T. R. p. 480.] This venture had failed prior to the time of the organization of the DIRECT-U-SYSTEMS. No profits had been received by any of the purchasers of the franchises, but the NATIONAL DIRECTORY SYSTEMS had received an appreciable sum of money in the sale of the franchises. With knowledge of this, the appellant and his co-defendants organized the DIRECT-U-SYSTEMS, operated the business upon the same plan which had been used by the NATIONAL DIRECTORY SYSTEMS, and sold, and collected from a large number of persons, including those named in the indictment, a sum of money amounting to many thousands of dollars.

These sales made by appellant and his co-defendants were the result of advertisements placed in newspapers throughout the country, and were consummated in each instance partly by the use of the mails, and partly by salesmen sent out by the Company for personal contact; that is to say, each purchaser was first contacted by mail and later by the salesman.

Each of the letters set forth in the respective counts in the indictment were admittedly mailed by the defendants, and each of the defendants had knowledge of the method of the business, and the fact that the mails were being used to conduct the business. Likewise, each of the defendants actively engaged in the business.

The appellant was actively engaged in the business from its inception to and including the date of the filing of the indictment, and in connection with his activities wrote many letters under his own signature, as well as the signature of C. W. Talbott and others.

It is also uncontradicted that in the course of the operations of the appellant and his co-defendants, Harold E. Weeks of New York City, Ralph H. Bergen of Richmond, California, Ralph A. Burke of Oakland, California, H. R. Brown of San Francisco, California, Cecil I. McReynolds of Washington, D. C., E. M. Shutt of Cleveland, Ohio and Elsie Whitney of Alameda, California, each responded to advertisements in newspapers, and each was contacted by the defendants or their representatives, and that each of said persons purchased franchises as a result, thereof, and that of such purchases so made by the respective persons, no profit was had by any of them, except Harold E. Weeks. In regard to Mr. Weeks, there was a conflict of testimony, since it was the contention of the appellant and he so testified that, in his opinion, Mr. Weeks had earned a profit, while on the other hand, Mr. Weeks testified that he did not receive any profit.

The evidence shows that the purchasers of the franchise were unable to dispose of the advertising space provided by the devise and that much of the space sold was cancelled because of the failure of mechanical operation of the electrical directory in some instances and, further, because of the inability of the franchise holder to obtain delivery of the electrical directory after it was ordered. As to those directories delivered, the evidence shows a total lack of successful mechanical operations, and the inability upon the part of the franchise holder to procure from the appellant and his co-defendants parts or repairs to correct faulty operation.

Each of the purchasers above named, with the exception of H. R. Brown, carried on extensive correspondence with the appellant and his co-defndants, with the view of being reimbursed for the funds advanced by them under the terms of their respective franchise agreements. In connection with their respective efforts, each was offered by the appellant and his co-defendants, a document or a settlement purporting to be a "Re-purchase Agreement" by the terms of which the territory was to be resold by the defendants to other persons, and the original purchaser was to be reimbursed out of profits to be earned by the new purchaser. In some instances, these Re-purchase Agreements were accepted and in others refused, but in no instance did any of the purchasers ever receive any return of his investment. The evidence does disclose Compromise Settlements in amounts much less than the original investment, but with the exception of H. R. Brown, it is uncontradicted that none of the purchasers received their original investment.

ARGUMENT.

Point 1.

The Evidence Is Sufficient to Establish That There Was a Scheme or Artifice to Defraud and That in the Execution of the Scheme, the Mails Were Used in Furtherance, Thereof.

There are two elements of the offense:

(a) The devising of some scheme or artifice to defraud and be the use of the mails in the execution or attempted execution, thereof, such misuse of the mails being the gist of the offense. The crime is complete when the scheme to defraud is devised and the mails are used to execute it:

Busch v. U. S. (C. C. A. 8), 52 F. (2d) 79;
Belt v. U. S. (C. C. A. 5), 73 F. (2d) 888;
Alexander v. U. S. (C. C. A. 8), 95 F. (2d) 873.

The appellant contends that he was acting in good faith in such connection as he had with the selling of leases upon the advertising devise described in the indictment. The Courts have said that good faith and honest belief of the truth of the representations made is a complete defense, provided the representations do not go beyond such an honest belief, and that the honest belief is in actual existence.

Where the scheme is based upon false and fraudulent representations, pretenses, and promises made to deceive and defraud, it is not a defense that the promoter believed he could make a success of the enterprise, or protect the investor against loss. In other words, he cannot make a wrongful matter right by pointing to the ultimate good intentions:

Foshay v. U. S. (C. C. A. 8), 68 F. (2d) 205;
Hymey v. U. S. (C. C. A. 6), 44 F. (2d) 134.

The undisputed proof establishes a plan or scheme on the part of the appellant and his co-defendants, and the use of the mails in the furtherance, thereof; and, further, that the scheme or plan was put into force and effect with knowledge on the part of the appellant that a previous venture in which he had been engaged, the NATIONAL DIRECTORY SYSTEMS, whose plan of operation was identical with that of the DIRECT-U-SYSTEMS, had failed definitely establishes a lack of good faith or honest belief on the part of the appellant and his co-defendants in dealing with those parties named in the indictment.

The testimony given by the witness, CHARLES S. WALLACE, a salesman, who was employed by the defendants for a period of two years and whose duty was to contact those persons answering the newspaper advertisements, definitely establishes that the defendants and, particularly, the appellant gave him his instructions as to what recommendations should be made and the manner and method of making them. [T. R. pp. 117 to 132.] He identified a document (Government's Exhibit No. 25) furnished to him by the appellant, which, in itself, refutes any contention on the part of the appellant that he was acting in good faith.

Among other representations made by the appellant and his co-defendants was that the DIRECT-U-SYSTEMS was a Corporation financially able to take care of its contracts. Yet, in a letter dated May 29th, 1940 to the witness, WALLACE, by the appellant and being a part of Government's Exhibit No. 27, excerpts of which are contained in record at pages 126 to 131, constituting admissions on the part of the appellant that upon that date and while appellant and his co-defendants were still seeking purchasers,

the financial status of the appellant and his co-defendants was contrary to the representations so made.

Again, it should be noted that the appellant testifying in his own behalf upon cross-examination admitted that he wrote a letter, dated August 8th, 1940, to Mr. Harold E. Weeks (Government's Exhibit No. 8), containing the following knowledge:

> "As far as N. H. Marshall is concerned, he is not employed by us nor has he been, but is well known by us, as he was at the time the old National was operating, most successful, as the financial records will show. It was when he handled the sales and through his efforts and knowledge and hard work the most successful development was done, not only by the company but by the lessees. When he left the old National due to some personal and domestic difficulties, their decline started and when it reached a point that the writer did not care to be associated, he disposed of his interest and the old investors realized that they had made a mistake. And we are sure that if you knew him we are sure that you would agree. He is interested in some educational business, but we are sure that if you will write him addressed to him Post Office....., Hollywood, California, that it will be (114) forwarded to him and he will, we feel, be more than glad to assist in rectifying any reports that may be damaging to you or this company."

and that he signed the name of Mr. Johnstone" to the letter. [T. R. pp. 289 to 290.] We submit that that action on the part of the appellant establishes, beyond any peradventure of a doubt, a total lack of good faith or honest belief in connection with his activities.

Point 2.

The Evidence is Sufficient to Establish a Conspiracy by the Defendants to Use the Mails in Furtherance of a Scheme to Defraud.

This Court in the case of *Marino v. U. S.*, 91 F. (2d) 692, established and settled, the principals applied to the crime of the conspiracy. The opinion gives consideration to many of the outstanding conspiracy cases and defines conspiracy as:

> "A conspiracy is a combination of two or more persons by conserted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means."

Under the General Conspiracy Statute, there are three essential elements:

(a) The conspiring together of two or more persons;

(b) Either to commit an offense against the United States, or to defraud the United States; and

(c) The doing of some act by one of the parties to effect the object of the conspiracy, termed an "Overt Act" (18 U. S. C. 88).

It is well settled in the *Marino* case, *supra,* that it is not material to the offense that the unlawful purpose shall be accomplished; that the plan agreed upon originated with the persons charged; that all of the members shall know each other; that any but the leading conspirators shall know the exact part the others are to perform; that all the details be planned in the beginning; or, that the plan agreed upon is to be executed by a single conspirator.

In the case at bar, the unlawful purpose was accomplished, the plan agreed upon originated with the persons charged, each of the members knew each other, each of the conspirators knew the exact part that the others would perform, all of the details were planned in the beginning, and the plan agreed upon was not to be executed by a single conspirator.

The appellant admitedly joined with the others at the very inception of the business and continued his connection up to and including the date of indictment.

The indictment charges in Count 11, thereof, the commission of numerous Overt Acts; the record is replete with proof of the commission of various Overt Acts, and the uncontradicted evidence is that all of the Overt Acts alleged were committed.

The appellant in his opening brief asserts that the whole question presented upon the Appeal is whether or not Appellant Marshall was acting in good faith in such connection as he had with the selling of leases upon the advertising devise described in the indictment. We believe that such a statement constitutes a false premise. The cases of:

Riper v. U. S. (C. C. A. 2), 13 F. (2d) 961;
Levine v. U. S. (C. C. A. 9), 79 F. (2d) 364;
Schwartzberg v. U. S. (C. C. A. 2), 241 Fed. 348;

and numerous others are authority for the proposition that all who, with guilty knowledge, join a combination formed for a criminal purpose within the purview of the Statute, subject themselves to the penalty provided, regardless of their participation or their lack of understand-

ing of the scope or membership of the unlawful combination. It is enough that the members agree to execute the criminal purpose and, of course, under the well established rule, the act of one conspirator becomes the act of all.

Hence, the question before the Court is whether or not all of the conspirators were acting in good faith. The appellant had not, up to the time of the indictment, severed his connection from the business, and not having done so, was bound by the activities of his co-conspirators.

Conclusion.

It is submitted that there is literally a mass of evidence in this case incriminating Appellant Marshall and involving him as the principal instigator and leader of the scheme charged in the indictment. When the whole case is considered, it is respectfully submitted that the Judgment of Conviction should be affirmed as to the appellant.

Respectfully submitted,

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United States Attorney,
JAMES M. CARTER and
CHARLES H. VEALE,
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Attorneys for Plaintiff-Appellees.

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NORMAN H. MARSHALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT NORMAN H. MARSHALL.

Statement of Basis of Jurisdiction.

Appeal from judgment rendered against appellant Marshall by the District Court of the United States, for the Southern District of California, Central Division, upon a verdict finding the appellant guilty of violating Section 3381, Title 18, U. S. C. (commonly known as the Mail Fraud Statute) as charged in Counts 1, 2, 3, 4, 5, 8, 9, and 10, and guilty of violating Section 88, Title 18, U. S. C., as charged in Count 11. All of these counts, except Count 11, charged a substantive offense; Count 11 charged a conspiracy to violate Section 338, Title 18, U. S. C. Indictment, R. 2-57; Verdict, R. 60; Judg-

ments, R. 62-64.] The appellant was sentenced to a term of imprisonment of three years on each of Counts 1 and 2; and two years on Count 11, sentences on said counts to run concurrently with each other, making a total term of three (3) years, and sentence was suspended and placed on probation on each of Counts 3, 4, 5, 8, 9 and 10, the suspension of sentence and the probation periods to run concurrently with each other and commencing at the expiration of the service of sentence on Counts 1, 2 and 11. [R. 62-63.]

Thereafter, the appellant duly filed his Notice of Appeal from the said judgment against said appellant within the time prescribed by law. [R. 65.]

Thereafter, appellant filed an Assignment of Errors within the time prescribed by law. [R. 73.]

Thereafter, a Bill of Exceptions containing all of the evidence except the exhibits was prepared and filed. [R. 74-292.] By stipulation and order of Court all exhibits introduced at the trial were transmitted and certified to the Circuit Court of Appeals. [R. 71-72, 293.] All exhibits. [R. 294-513.]

Thereafter, the record in this case, including said Bill of Exceptions, and all exhibits separately and directly certified, was filed with the clerk of this Honorable Court. [R. 293.]

Statement of the Case.

The counts, with the exception of Count 11, of the indictment under which appellant Marshall and three of the other defendants on trial was convicted, and pursuant to which judgment was entered against the appellant, charged that this appellant and the defendants Helen May Fawkes, Llewellyn F. Marsh, Norman H. Marshall, Albert A. Martinez and Charles W. Talbott ". . . did devise and intend to devise a scheme and artifice to defraud . . ." from the persons named in the indictment and other persons unknown to the Grand Jury, and from members of the general public who answered newspaper advertisements by signing letters bearing their names and addresses, ". . . and to obtain money and property from said persons intended to be defrauded by means of false and fraudulent pretense, representations, statements and promises . . . which money and property defendants intended to convert to their own use and gain without *giving* or *intending* to give the persons intended to be defrauded *anything* of an equivalent value or *anything of value* in return for their money or property, which said scheme was . . . as follows." [R. 2-4.] (Italics ours.)

Defendants would insert ads—(a) Business connection permanent; (b) Income reasonably $6,500.00 yearly; (c) Cash deposit $1,500.00 to $3,750.00 required, which would be "secured and returnable." [R. 4.]

Under name of Direct-U. Systems wrote persons responding to ads stating representative would call in person, not a promotional matter, nothing to sell applicant, defendants to select a person interested in "permanent connection which increases yearly"; *money obtained by defendants as deposit from franchise holders as advance rentals not to be returned but retained by defendants for their own use.* (Italics ours.) [R. 4-5.]

When franchise holder found it impossible to make large earnings promised by defendants, or any earnings at all, and demanded return of money which defendants had induced him to deposit with company to guarantee his success, defendant refused to return any portion thereof,—but offered in lieu thereof worthless documents known as "re-purchase agreement" wherein they agreed to pay franchise holder percentage of any monies received by company from others in same territory whom defendants might induce to take a franchise. [R. 5.]

That, *thereafter,* (italics ours) defendants contacted persons intended to be defrauded and by oral statements, letters, etc., defendants represented and pretended [R. 5]:

(a) Direct-U-Systems corporation organized in California, company of good reputation, high integrity, unlimited credit standing and exclusive manufacturers of electrical directories for display in hotel lobbies [R. 5];

(b) Direct-U-Systems in position to give permanent, lucrative and non-competitive employment persons agreeing to become franchise holders and distributors of directories in given territories, and who would pay money as advance rentals on specified number of directories [R. 5-6];

(c) A franchise holder would be given exclusive right to install directories and rent space to business concerns thereon at certain stipulated rates, keeping all monies so derived with exception of agreed portion to company as royalties, and that original earnings, pyramiding as boards increased, would be earned [R. 6];

(d) That Direct-U-Systems, for annual rental fee for each directory furnished, would immediately supply franchise holder with as many of said devices needed for placement in hotels and install and maintain at all times, without cost to franchise holder [R. 6]; whereas, in truth and in fact, as defendants then and there well knew, Direct-U-Systems was not any of the things represented and defendants could not do any of the things represented. [R. 6.]

Success of franchise holder would be guaranteed and money deposited with company would be *secured and returnable* (italics ours)—whereas, in truth and in fact, this was not correct. [R. 6-7.]

Earnings of $6,500.00, or more, per year were being made by franchise holders—whereas, in truth and in fact, no earnings being made by holders and none to be made by holders, but on contrary, such holders had suffered and would suffer loss, disappointment and damage through dealings with Direct-U-Systems, all known to defendants. [R. 7.]

Direct-U-Systems business, international in scope, had long record of successful operation and in position to render satisfactory and continuous service—whereas, in truth and in fact, as defendants then and there well knew, this was not true, but on contrary was poorly financed and

equipped, without adequate facilities to comply with its contracts to carry on successful business. [R. 7.]

That electrical directories then and there installed and in operation in lobbies of Hotel Multnomah in Portland, Oregon, and New Washington Hotel, Seattle, that they were satisfactory, successful and in good order—whereas, in truth and in fact and known to defendants, Direct-U-Systems directories never in hotels but that directories manufactured by defendants previously under name of National Directories Systems Company that failed and out of existence, had been in lobbies described for short periods in 1938 and 1939, said directories not satisfactory and successful and not kept in good order, but had been removed because proven a failure. [R. 7-8.]

Direct-U-System unique and first and only advertising medium of kind—whereas, in truth and in fact, as known to defendants, not so, but on contrary, familiar devices then and there on market and had been for many years, including directories which defendant theretofore marketed and unsuccessfully operated. [R. 8.]

Directories were in great demand by hotels and business men and space for installation of boards in hotel lobbies and subscription for advertising readily obtained—whereas, in truth and in fact, as defendants knew, not so. [R. 8-9.]

Direct-U-Systems directories protected by patents and patents pending, holders would not have any competition in distributing and selling advertising space—whereas, in

truth, as known to defendants, not so, but on contrary, compelled to compete with others in identical line of business and who were then operating at time franchises bought by those who intended to be defrauded—all known to defendants. [R. 8-9.]

Directories to be substantially constructed free from defects and mechanical errors and render steady dependable service—whereas, in truth and in fact, as well known to defendants, not so, but on contrary, subject to frequent interruptions due to imperfect construction. [R. 9-10.]

Directories to be shipped to franchise holders promptly —whereas, in truth, as known to defendants, not so, but shipments delayed for long and unreasonable periods. [R. 10.]

Direct-U-Systems would maintain and service directories shipped and installed and at all times keep them in good working order—whereas, in truth, and known to defendants, company could not and would not maintain service, and could not and would not at all times, or at any time, keep directories in good working order. [R. 10.]

Said representations, etc., made, or caused to be made by defendants to persons intended to be defrauded as a part of the scheme and artifice to said persons intended to be defrauded, as aforesaid. [R. 10.]

Said representations, etc., made by defendants through and by means of oral statements, writings, etc., so worded and expressed as to deceive, were then and there

intended to deceive persons intended to be defrauded and any person who might hear or receive them. [R. 11.]

Count 11 charges a conspiracy to commit the substantive acts referred to in the preceding counts, and alleges thirteen overt acts. [R. 52-56.]

The substantive Counts 1, 2, 3, 4, 5, 8, 9 and 10, allege the mailing of letters in furtherance of said scheme, which will be hereinafter separately discussed in connection with the analysis of the sufficiency of the evidence.

It will be noted at the outset that certain repugnancies appear in the indictment. For instance, the indictment charges on the one hand that the money obtained by the defendants from the persons intended to be defrauded as a deposit on advance rentals was not to be returned to the franchise holders but retained by the defendants for their own use [R. 5], and on the other hand charges "that the success of the franchise holder would be guaranteed and the money deposited by him with said company would be secured and returnable." [R. 7.]

The essence of the scheme, as charged in the indictment, seems to be that under the guise of a business proposition wherein the defendants represented themselves as manufacturers of directories for placement in hotel lobbies by franchise holders, that the real fact was, as alleged in the indictment, that the defendants, through this medium and in bad faith, made their proposition a vehicle to obtain money without giving anything of equivalent, or anything of value, to the franchise holders.

Questions Presented.

There is but one question presented on this record for consideration by this Honorable Court, *i. e.*, the sufficiency of the evidence. The question is subdivided into two separate considerations, viz.:

I. That the Court erred in refusing to grant the motion for directed verdict made by defendant at the close of the Government's case, to which an exception was taken. [R. 238.]

This point is before the Court of Appeal as Assignment of Error No. 1. [R. 73.]

II. That the Court erred in refusing to grant the defendant said motion for directed verdict of not guilty at the close of all the evidence to which an exception was taken. [R. 292.]

This point is covered by Assignment of Error No. 2. [R. 73.]

It will be our purpose to analyze the evidence separately as it applies to the points at issue. In approaching this analysis we believe certain consideration should be given to the following propositions:

(A) That under the indictment the scheme consisted of advertisements for residence managers which stated that the business connections would be permanent, that the income would be reasonably $6500.00, and that the money sought to be obtained from persons intended to be defrauded consisted of cash deposits ranging from $1500.00

to $3750.00, which was obtained at the time the contracts were signed; that certain representations were made to persons answering the ad by mail, and thereafter by the company's representative in talks with the prospective alleged victims prior to the execution of contracts and the obtaining of the cash rental deposits. Included in the gist of the scheme is the allegation that when the persons who had entered into the contract found it impossible to make the large earnings promised to him, or any earnings at all, and demanded the return of his money which he had deposited, defendants refused to return such deposit, or any portion thereof, but would give in lieu a worthless "Re-purchase Agreement." [R. 4-5.] We take the position that the remaining allegations of the indictment commencing with "That thereafter," the defendants would contact the persons to be defrauded and by oral statements, etc., would represent and pretend, is, by the language of the indictment, surplusage. [R. 5.] We contend from the very wording of the indictment, certain representations alleged to have been made under such allegations were, in fact, made after the scheme had been conceived and after the letters, charged in the substantive counts of the indictment to have been mailed in furtherance of the object of the scheme, were received by the persons intended to be defrauded. This is to say, that it is our purpose to attempt to establish that the evidence shows that in each and every one of the counts involved there is a total absence of evidence tending to show any scheme to defraud on the part of the defendant, accompanied by the necessary specific intent at the time the substantive count letters were mailed by the Direct-U-Systems.

(B) That an examination of the count letters alleged to have been mailed in furtherance of the scheme show that, rather than being in furtherance of a scheme to defraud, on their face show a lack of any specific intent, and, moreover, show that they were mailed after the money was received by the company and therefore after the alleged purpose of the scheme was accomplished.

If our contentions are correct as to the substantive counts, then Count 11, which charges conspiracy to commit the substantive events, must fall, since it is dependent upon the existence of the scheme as alleged in Count 1.

Points of Law Involved.

In this connection, we wish to set forth certain principles of law which we respectfully submit will support the contentions above made.

1. A false representation does not amount to fraud unless there is specific fraudulent intent at the time the representation was made.

Yusen v. United States, 8 Fed. (2d) 6.

2. The fraudulent intent must exist at the time the mails are used.

Wallington v. United States, 233 Fed. 247.

3. Evidence is insufficient where it shows that the scheme did not exist prior to the date of mailing the letters.

Hass v. United States, 93 Fed. (2d) 427.

4. It is not an offense if the defendants honestly believe the representations to be true.

Rudd v. United States, 193 Fed. 914.

5. Although a scheme may be visionary, this does not of itself make it fraudulent if the promoter actually believed in it.

Sandals v. United States, 213 Fed. 569.

6. The question of the good faith of the defendant is the cardinal question involved.

Post v. United States, 135 Fed. 1.

7. The taint of fraud may be removed where it appears there was no personal profit and refunds were made.

Corliss v. United States, 7 Fed. (2d) 455.

8. It is not enough that there be evidence of a scheme to defraud, but it must also be shown that the mails were used as a part of the scheme charged, and that each letter relied on was not sent out until after the scheme of fraud had been borne.

United States v. Buckner, 108 Fed. (2d) 921;

Vann v. United States, 76 Fed. (2d) 808.

9. The use of the mails must be in furtherance of the scheme charged.

United States v. McKay (D. C., Mich., 1942), 45 Fed. Supp. 1001.

Facts in Evidence and Argument Thereon.

A. Prosecution's Case.

We believe it to be in the interest of clarity to take up a discussion of the counts in the order in which the intended victims appear in the record.

1. Harold E. Weeks, alleged to be the victim and the subject of the alleged scheme to defraud. (Counts 5 and 8 of the Indictment.) [R. 28, 39.]

Mr. Weeks testified that he was a consulting engineer, that he answered an advertisement which stated, in substance, that they were seeking a residence manager, permanent connection, income reasonably $10,000.00 yearly, $3750.00 cash required secured and returnable. He testified that thereafter he received a communication (which is not one of the count letters) acknowledging his letter and stating that a representative would call upon him. He testified that thereafter Mr. Wallace, representing Direct-U-Systems called upon him. [R. 76-77.] He testified that he entered into an agreement with Mr. Wallace, acting for Direct-U-Systems, on the 27th day of July, 1939. This agreement was received as Government's Exhibit 4. [R. 78-80.] Attached to the exhibit is a schedule of anticipated income. [R. 81-83.] Mr. Weeks further identified, as part of his testimony, Government's Exhibit 5, which was his check for the sum of $3750.00 dated August 1, 1939. [R. 84.]

It is respectfully submitted that the object of the scheme charged in the indictment was completed when the witness Weeks paid the money to Direct-U-Systems, which, as we stated, is August 1, 1939, and that the scheme, if there was one, was completed on that date.

Therefore, we respectfully submit that since Count 5 is a letter from Direct-U-Systems, with which defendant was connected, to Weeks dated May 1, 1940, that this letter was not in furtherance of any scheme to defraud since the alleged object of the scheme charged in the indictment was accomplished with the receipt of Week's money. [R. 28.] Furthermore, the tenor of the letter, which is the subject of Count 5, clearly shows that instead of it being a letter which would be the subject of any scheme to defraud, it is a letter which for the most part refers to Mr. Weeks' failure to cooperate.

The same reasoning applies to Count 8, which is a letter mailed by Direct-U-Systems on August 8, 1940, to Weeks. [R. 40.] An examination of this letter likewise reveals that it can in no way be considered as in furtherance of the scheme charged in the indictment, which was to obtain money and property from the intended victims, since, as we have shown, what money was obtained from Mr. Weeks was received on August 1, 1939. It appears to us, and we therefore urge, that Counts 5 and 8 must fall since the evidence positively shows that the letters, which constitute a necessary element to support the offenses charged, were not mailed until after the scheme charged in the indictment was accomplished.

Apart from the argument just made, it positively appears from Mr. Weeks' testimony that the company did everything that they said they would do in their contract. This is apparent in the cross-examination of Mr. Weeks wherein he identified Defendant's Exhibit A, "Verification of Assistance Given to Franchise Owner." [R. 113-114.] It appears from this verification, which was signed by Mr. Weeks, that through Mr. Wallace, representing

the company, that assistance was given intermittently from August 1st to August 14, 1940, and that he trained the sales forces every day from August 14th. Mr. Weeks stated that he had received all the assistance the company had agreed to furnish him, and all supplies the company had agreed to give him in the campaign. Mr. Weeks testified that he had a great deal of trouble with the first machine and identified various letters received by him from the company, and, in turn, letters from him to the company, most of these letters written subsequent to Mr. Weeks having parted with his money. We believe it pertinent to point out in Mr. Weeks' letter of July 31, 1939, that portion in which he advises the company Mr. Wallace had been very cooperative. [R. 85.] He testified that Mr. Wallace remained in New York about four weeks after signing the contract; that he (Wallace) selected salesmen for him which he approved. [R. 84.]

As indicating total lack of criminal intent, there is a letter to Mr. Weeks, which is Government's Exhibit 15, and which is in reply to a letter from Weeks referring to the trouble he was having with the machine, in which letter the company stated, in substance, that they were sorry he had made the installation in the hotel when he felt the equipment would give him trouble. It stated that they had overcome similar difficulties in the past through adjustment and would appreciate Weeks having it taken care of there and the company would take care of the cost, if it was not too much, while the company was preparing another rotary in accordance with Weeks' suggestion. [R. 96-97.]

On cross-examination Weeks testified it was the first machine that gave him the most trouble. He stated at

the time he ordered it it was for a rush exhibition and he was advised by the company that a rush order would mean rush construction. Weeks testified that he was not told that the company's product was the only one on the market but that it was the best, and stated that they were beautiful cabinets. [R. 114-115.]

Weeks testified that the most serious fault was the animator, which was the mechanical feature, and that was his chief complaint, but he testified these animators were improved on later installations. [R. 116.]

Weeks testified that the company sent him a new machine to replace the first one with which he had so much trouble. [R. 102.]

Weeks further testified that he did receive all the machines for which he had paid cash deposits. [R. 103.]

It is true that Weeks testified that he did not make any money, but we respectfully submit that the actions of the company's representative in remaining with Weeks for four weeks, interviewing, selecting and training the salesmen, the authorization of the company for Weeks to incur the expense for repairs on the original machine, which was a rush job, the replacement of that machine later at no cost to Weeks, all positively show an absence of any scheme to defraud, and on the other hand, an honest effort to fully comply with the terms of the contract.

We therefore submit, for the reasons above stated, that it was error for the Court to refuse defendant's motion for directed verdict as to Counts 5 and 8, both at the end of the Government's case and at the conclusion of all the evidence, for the reasons: (1) that there was no evi-

dence to support the scheme charged in the indictment; (2) That the letters which are the basis of substantive Counts 5 and 8 were not in furtherance of any scheme; and (3) the actions of the defendant and his company clearly negative any criminal intent at the time Mr. Weeks was solicited to sign the contract, which he subsequently executed.

2. Charles S. Wallace. [Direct, R. 117-131; Cross, R. 131-132.] Witness Wallace identified himself as a salesman retained by Mr. Marshall in 1939. He stated that he sold cabinets to Mr. Weeks (Counts 5 and 8), but never made any representation not contained in the company's literature or in the kit. [R. 117.]

Witness Wallace identified a letter dated July 22, 1938, which is addressed to Mr. King. He stated that it was in the kit Mr. Marshall had given him. The witness stated he showed Mr. Weeks letters from managers of Hotel Multnomah and the New Washington Hotel. [R. 117-118.] The letters appear as Exhibits 58, 59. [R. 192-193.] There is absolutely no evidence in the record that the statements made by these hotel managers were untrue.

Exhibit 25 was introduced, which was identified as containing instructions given to the salesmen. [R. 118-125.] Portions of these instructions to salesmen we respectfully submit again show there was no criminal intent to defraud, as alleged in the indictment. For instance, at R. 121, is the following statement, "As I told you, we are not interested in securing the services of a high pressure promoter type of a man, but we are interested in securing the services of a man with good common sense and business experience that will be willing to devote his time to

supervisory work, collecting the money, etc.; that is interested in a permanent connection." . . . "Our experience has shown that it is necessary to have some local men to handle the supervising and checking to see that the advertisers sold are really good reputable men or concerns that would be really representative of their respective lines." . . . "we have nothing to sell you, which is true, for we do not sell any of our equipment, but we make all of our installations on lease basis. We lease the system for the first year for $750.00. Now the way the company figures, this lease rental just about pays for the building of the system, its maintenance, upkeep, etc., and then the company gets a 20 per cent royalty, or $720.00, which is practically all profit, and it is from this that I receive my compensation, etc." In reading these directions over, while there are certain inaccuracies, such as the fact that the salesman was to receive his commission out of the 20 per cent royalty, it does not seem to be a material misrepresentation. The significant deduction to be gleaned from an over-all perusal of the instructions indicates again that the company was anxious to get a good business man and that there is no evidence to disprove the representations that the company's profit, if any, was to come from royalties, that the cash advance rentals went to the building and installation of the cabinets, operating overhead and commission to the salesmen. With respect to the latter, it appears that the witness Wallace received 30 per cent of the cash rentals obtained. [R. 125.]

The witness testified that at the time he received the letter of instructions he did not believe it to be misleading, but in response to the inquiry by the Court, he stated that now that the Court pointed it out to him, he did. [R. 125.]

The witness Wallace testified that he saw the installations and cabinets sent to Mr. Weeks in New York. [R. 125-126.]

He also identified excerpts from certain letters from Direct-U-Systems to the witness as contained in Government's Exhibit 27. The excerpts appear at R. 126-131. Certain of these excerpts, we respectfully submit, do not intend to prove or disprove any material allegations in the indictment.

On cross-examination the witness Wallace testified that he never made any representation that to his knowledge was false, and that he himself knew, when he first went out for the National Directories System (a company with which Marshall and Talbott were associated up to 1938) that they were new in the field. [R. 131.]

Witness Wallace testified he assumed that Mr. Weeks (Counts 5 and 8) was always dissatisfied and that he did know Mr. Weeks was not fully cooperative. He testified he knew some of the installations Mr. Weeks had were working. [R. 131-132.]

3. Ralph H. Bergen. (Count 10.) [R. 49.] Witness Bergin is one of the alleged victims and is the subject of Count 10 of the indictment. The Bill of Exceptions appears to be silent as to the exact date the agreement was entered into with Mr. Bergen, but from an examination of Count 10 of the indictment, which is a letter from Direct-U-Systems to Bergen, we note the agreement was entered into on November 6, 1940, and apparently the money was received on that same date since the count letter, dated November 9, 1940, acknowledges receipt of the sum of $2,250.00. [R. 49.]

We respectively submit that an examination of this letter (Count 10), on its face, proves it was not written in furtherance of the scheme alleged in the indictment, for, as we have previously pointed out, the scheme charges that it intends to obtain money and property and pursuant thereof, they used the mails. Whereas, the letter itself shows that before the recourse to the mails, which is necessary for the existence of the offense, all the money obtained from Mr. Bergen had already been received. For this reason alone we therefore respectfully submit that there is no evidence to sustain Count 10 of the indictment and a motion for directed verdict at the close of the case should have been granted.

Apart from that, however, the witness testified to representations made to him by Mr. Bryant, an agent in the company. Included in these representations are the following: San Francisco was virgin territory and that there had not been any machines there before. [R. 133.] He states that after he signed the contract he came to Los Angeles and met Talbott and Marshall and stated he had a conference with them and nothing was said contrary to what Bryant had told him. There is no positive evidence that the witness told Marshall and Talbott of these representations made by Mr. Bryant. In fact, there is no evidence that appellant Marshall knew that Bryant made any representation whatsoever. [R. 133.]

The witness Bergen testified that at the time he was interviewed by Mr. Bryant and prior to his signing the contract their conversation took place in the Sir Francis Drake in San Francisco where there was a machine on exhibition. [R. 132-133.]

The witness testified that the machine which he saw in the Sir Francis Drake was turned over to him; that the machine had been used as a sample. He stated that he sold three spaces at $10.00 per month each, that there was not much difficulty with the electrical directory but that the card display did not work satisfactorily at all.

The witness then identified several letters which he had written and which he, in turn, received from the company with which the defendant was connected. [R. 135-140.] An examination of this correspondence shows that these letters were written after the alleged scheme charged in the indictment was accomplished and do not tend to prove or disprove any of the allegations.

The witness testified that he was offered a re-purchase agreement [R. 140], but testified that he did not sign it. [R. 142.]

On cross-examination witness identified Exhibits FF and GG, which were two additional contracts entered into subsequent to the first one and which purportedly enlarged the territory. [R. 154, 159.] The witness admitted he signed a statement that Direct-U-Systems had done everything it had agreed to. [R. 162.] The witness also identified Defendant's Exhibit JJ, which is a letter written by defendant December 24, 1940, wherein he stated that the consumer reception was all that could be expected and that he had a nice back-log of business that would crack soon. [R. 165.] Contrasting this, we have a letter, Government's Exhibit 9, which was written by Bergen wherein he stated he had been ill a great deal of the time since Christmas and seeking to withdraw. [R. 147-148.]

After the introduction of Defendant's Exhibit EE, which is the agreement entered into on November 6, 1940

[R. 148-151], there again appears an anticipated income and expense diagram. [R. 151-153.] Since this anticipated income and expense diagram appears throughout the record and is attached to every agreement, we think it well to here point out that there is no evidence to show that any of the estimates therein given were false.

4. H. R. Browne [not a victim but mentioned in overt act 10, Count 11, R. 55]. Mr. Browne testified that he was a resident of Oakland, California, and there met the defendant Martinez in July of 1938. He testified that Martinez estimated that if Browne had ten advertising boards he ought to clear $7,000.00 in the territory around San Francisco. He stated that he gave the company $1500.00, *all of which was returned to him in 1939.* (Italics ours.)

Browne further testified that the cabinet he received for the Plaza Hotel in San Francisco was top-heavy and contained other mechanical imperfections, and that he did not try to obtain any other cabinets thereafter. [R. 176.]

Although this testimony of Browne's does not substantiate the overt act 10, Count 11, I assume that his testimony was introduced as tending to show fraudulent intent. However, we respectfully submit that the testimony of Mr. Browne to the effect that he received all of his money back, indicates a total absence of criminal intent existed in the mind of the defendant at the time these agreements were executed. It further shows the good faith of the defendant and his associates, and the record shows that they provided the machines as contracted for, trained salesmen, obtained leases, prepared advertising cards and sent other stimulating material to their franchise holders. [R. 176.]

5. E. M. Schutt. [Count 4, R. 25.] Mr. Schutt testified that he resided in Cleveland, Ohio, and after responding to an ad was contacted by Mr. Morgan representing the company. He testified that Morgan told him that patents were pending and that he gave Morgan a certified check for $1500.00. Mr. Schutt further testified he learned there was another such company, the Robot Mat Company, but that Morgan told him it was out of business. He stated that he went around with Morgan endeavoring to get leases in the various hotels but that they couldn't get any. He stated that Morgan finally got one at the New Amsterdam Hotel but he told Morgan it would not be of much value because it was a residential hotel. He stated Morgan obtained other leases but they were not of much value. Prior to the time he gave Morgan the $1500.00 he testified that the latter had said the company was thoroughly reliable, could meet all obligations and had been doing business for a long time. The witness testified that he relied on these representations. He testified that he did not sell any advertisements, but he stated, *"I tried for only one week."* (Italics ours.) [R. 177.]

Witness identified an agreement entered into with Morgan and was marked as Government's Exhibit 44. Only one paragraph appears in the Bill of Exceptions and he identified the exhibit in full with the rest of the exhibits. The only paragraph of the agreement appearing in the Bill of Exceptions recites:

> "Lessor shall cooperate and assist lessee in securing five location leases; hire and train salesmen and render all additional assistance practicable." [R. 177.]

From what appears in the record, and from the witness' own testimony just above referred to, Mr. Morgan did everything that the quoted part of Government's Exhibit 44 called for.

The count letter naming Mr. Schutt as the victim is a letter from the Direct-U-Systems to Schutt dated February 8, 1940. [R. 25-28.] We respectfully submit an examination of this letter shows from the first paragraph that it was sent after the objective of the scheme, as alleged in the indictment, was accomplished, *i. e.,* that money had been obtain from Mr. Schutt. That is to say, that the count letter in question is in no way in furtherance of the scheme charged in the indictment. In fact, the whole letter is taken up with answering the difficulties Mr. Schutt stated he was having in getting started and winds up with the strong recommendation that he forget about the other competitors and go ahead with his own business. [R. 28.]

We respectfully submit, for the reasons above stated, the Court erred in not granting the motion for directed verdict made by defendant at the close of the Government's case, and again at the conclusion of the evidence, since it affirmatively appears that the object of the scheme, as alleged in the indictment, if one there be, was accomplished when the money was obtained from Mr. Schutt, and the count letter in question was written subsequent thereto and could not possibly be construed as being in furtherance of a scheme as alleged in the indictment.

We should point out to this Honorable Court, that there was identified and introduced into evidence considerable correspondence of a similar nature passing between Mr. Schutt and the company. [R. 177-184.] Since it is our

belief that it does not tend to prove or disprove any of the issues in the indictment, we are not disposed to take up a discussion of them at this time.

We believe the pertinent course of Mr. Schutt's dissatisfaction and failure is found in his direct testimony, "I did not sell any advertisements but I tried for only a week." [R. 177.]

The witness further testified that subsequent to his demands for the return of his money he went to California, visited the company's office where he met Mr. Talbott and stated that Talbott introduced him to a Mr. Painter, whom he now recognizes to be Mr. Marshall. Assuming, for the purposes of this argument (although it is later denied and explained in Talbott's testimony) that this is true, this in no way tends to prove or disprove any of the material allegations of this indictment. [R. 184.] It is obvious this conversation occurred long after the scheme was accomplished. The witness testified in this conversation that Talbott stated that apparently Mr. Marshall (this must be a typographical error as the witness had previously stated he dealt with Mr. Morgan. [R. 177.]) had misrepresented things to Schutt and that Talbott promised to get him his money back when the Board met, but that he did not receive it. [R. 184-185.]

6. Ralph A. Burke. [Count 1, R. 12; Count 2(a), R. 15-18; Count 2(b), R. 18-21.] Consideration of the testimony involving the alleged victim Burke, should be divided into a separate consideration of Counts 1 and 2, for Count 1 is a letter of March 29, 1939, acknowledging Mr. Burke's response to their ad. [R. 12-13.] Whereas, Count 2 consists of two letters, one of April 25, 1939, to

Burke from defendant Martinez, and one of April 26, 1939, from Burke to Talbott.

The letter in Count 1 is obviously written before money received; whereas, the letters in Count 2 fall within the same category previously discussed. That is to say, in Count 2, it cannot be contended it was in furtherance of the alleged scheme of fraud since it appears, on the faces of the respective letters in Count 2, that they were mailed after the alleged fraudulent objective was accomplished.

Mr. Burke testified that he resided in Oakland and that he was called on by defendant Martinez. He stated that he inquired of Martinez what protection he would have; that Martinez advised him there was nothing on the market like it, that it was completely patented, that it was brand new and had never been tried in San Francisco. [R. 186.]

Mr. Burke further testified that Martinez, after some figuring, thought he could make at least $6500.00 a year; that they were a very big concern; that they bought everything for cash and had no reason to have a rating with Dunn & Bradstreet. Martinez further told Burke, so the latter testified, that he, Martinez, received no commission on the money put up, that it was held in trust and if the franchise holder fell down on the job the money would be returned to him; that on the strength of these representations Burke paid the sum of $1500.00. [R. 186.] It is obvious that certain of these representations were false, since we have seen that the alleged victims Bergen and Browne operated in San Francisco and the record shows that the machines were not completely patented. However, we respectfully submit that there is no evidence to show that Martinez was authorized to make any of these statements by the defendant Marshall, nor that the

defendant Marshall had any knowledge of these representations. By stretching a point, it might be contended that Martinez' statement *re* the fact that he did not receive any commission on the money put up was an exaggeration of that portion of the sales advice to salesmen, Government's Exhibit 25 found at R. 120, ". . . but it does assist you in selection of the best applicant, as not only the company, but you yourself, are entirely dependent upon the selection of the right man . . ."; and again in the same document at R. 124, "It is my job to select the best man here that it is possible for me to find, as my future income as well as the company's is based entirely upon your success. . . ." [R. 124.]

However, as positive evidence that Martinez, if he made the representations, which we must assume for the purpose of this argument, he did so without authority, there is found an excerpt from Government's Exhibit 53, which is a letter to Burke from Talbott dated April 26, 1939, and which is the subject of Count 2(b) of the indictment, as follows: "There has never been any attempt to state that the directory system is patented in all details. . . ." [R. 187.]

The witness further testified that he did not receive a cabinet but that he did not ask for any. [R. 186.]

He further testified that he did not try to do any selling himself, that he had salesmen in the field who brought in six contracts; that when he learned the article was not patented and that people had been trying to sell it there previously, he asked for his money back and he did get $500.00 back and the company executed a re-purchase agreement with him. [R. 188-189.]

The witness further testified that he wrote a letter wherein he stated he thought the franchise could be ad-

vertised for sale on the basis of $7500.00, out of which he could get his money. [R. 188.]

From the testimony it is obvious that Count 1 of the indictment must fall because it affirmatively appears that the victim was not deceived, as alleged in the indictment. [R. 10.] The worst that can be said of the letter of March 29, 1939, which represents Count 1 of the indictment, is that it is an exaggeration and contains some "puffing" matter. There is nothing in the testimony of Mr. Burke, or anywhere else, so far as we have been able to find, which would justify a legal conclusion that the statements made in said letter were knowingly, wilfully and fraudulently made. We refer to the following statements: "Ours is a highly ethical and legitimate business proposition, dealing only with the larger business organizations, banks, etc. We are dependent on selecting a person of good general business experience who is interested in a permanent connection with an assured income which increases yearly. We must virtually guarantee the success of the one we select." [R. 12-13.]

The evidence of Mr. Burke obviously negatives the material allegations of the indictment as an essential ingredient of the scheme charged, wherein it is alleged, "that when a franchise holder found it impossible to make the large earnings promised to him by said defendants, or any earnings at all, and would demand the return of his money . . . said defendants under the name of Direct-U-Service would refuse to return such deposit of money, *or any portion thereof.*" (Italics ours.) [R. 5.] We urge this proposition because of Mr. Burke's testimony that he did not ask for any cabinet and did not receive any [R. 186] so that obviously he is not in the category just referred to in the indictment as one finding

it impossible to make the large earnings promised to him [R. 5]; nor is he one in the category, as charged in the indictment, to whom the defendants would refuse to return his deposit, *"or any portion thereof"* (italics ours) [R. 5] since it appears that he received $500.00. As a further element, it appears that Mr. Burke signed the regular agreement with the company and the same appears as Exhibit 52. [R. 346-349.]

We therefore submit that the Court erred in denying defendant's motion for directed verdict at the close of the Government's case, and again when it was renewed at the conclusion of the evidence, and that Count 1 should be reversed for insufficiency of the evidence to sustain material allegations of the scheme charged in the indictment.

Count 2—The arguments just made with reference to Count 1 are applicable to Count 2. With this, the further fact that the letters in Count 2 were written on April 25th and 26, 1939, which is subsequent to the date of the execution of the contract. [R. 346-349.] [Count letter 2(a), R. 15-18; Count letter 2(b), R. 18-21.]

A further examination of these letters indicates that they could not possibly be construed as being in furtherance of a scheme to defraud as alleged in the indictment. For these reasons, and the reasons urged in the attack on Count 1, we respectfully submit that the Court erred in not granting defendant's motion for directed verdict at the close of the Government's case, and again when it was renewed at the conclusion of the evidence, and that Count 2 should be reversed.

7. T. E. Morgan (who is not a victim). [R. 189.] Mr. Morgan testified that he was employed as an agent, in answer to an ad relative to Direct-U-Systems. He testified that in response to his inquiry Mr. Marshall told him the essential features had been patented but in the general features they had patents pending. He said he did represent to Schutt that it had not been tried before and he stated he did procure for Schutt five hotel locations.

This is the only positive evidence we have observed in the evidence that the defendant Marshall ever stated to anyone that the essential features of the machine were patented. However, having in mind that T. E. Morgan was an agent and a Government witness, the Court may consider as to whether or not his testimony was secured as the alternative of becoming a defendant. Further, as we have seen earlier in this brief, the company, through Mr. Talbott, has repeatedly stated that they never made any claims that the machine was patented but that they had several exclusive features. We believe the latter statements should more than overweigh the isolated testimony of Mr. Morgan since the letters referred to, as we have seen, were written to franchise holders shortly after inquiry. We refer specifically at this time to Count 2(b) [R. 19] wherein the company states in part, "It is impossible to cover all of the Directory features in patents as there is nothing basically patentable on this type of equipment with the exception of design patents, but the revolving equipment that we have is patentable." [R. 19.]

8. A. M. Gonzales and Ivan Smith (not victims). We are going to brief the testimony of these witnesses in short. They testified as to knowing Martinez in 1936 and in 1937 and 1938. Their testimony does not tend to

prove or disprove any of the issues in this case. [R. 190-191.] They apparently seek to contradict Government's Exhibits 58 and 59, letters from the Multnomah Hotel in Portland and the New Washington Hotel in Seattle, but we respectfully submit that they do not successfully accomplish their intended purpose.

9. L. C. WHITNEY (not an alleged victim in any of the substantive counts). [R. 191.] The witness testified that he was a banker and that he had negotiations with Mr. Marshall in February, 1939, and that after several conversations with Mr. Marshall entered into a contract with the company for which he paid $1500.00. [R. 191, 194.] He stated that Marshall told him that they were attempting to put these machines in San Francisco for the first time and that there would be no competition. [R. 194.] This representation, if made, is obviously untrue, but we respectfully submit that it is not material. It is not to be expected that a man, believing he had a legitimate product, would advise a new sales outlet that a previous man had fallen down in that territory. The witness stated that he did not get a cabinet but that he never tried to get one. [R. 194.]

The witness Whitney further testified that he received the return of $375.00 of his money and a re-purchase agreement, which he agreed to accept. [R. 196.]

10. MYRTLE SCHUTT (wife of alleged victim in Count 4). This witness testified that she was present when her husband talked to Marshall and Talbott in Los Angeles, corroborating her husband in testifying that Talbott had introduced Marshall as Mr. Painter. She testified that her husband stated to them that he was dissatisfied with the representations made to him in Cleveland.

We respectfully submit that this does not tend to prove or disprove any of the issues in this case as it is consistent, even though not ethical, for a person engaged in a legitimate business and in hard times to seek to avoid persistent creditors. [R. 196.]

11. Cecil I. McReynolds. [Count 3, R. 22-24.] The witness testified that in October 1939 he was in Washington, D. C. and saw a Direct-U-Systems ad and had a conference with a Mr. MacNeil, that MacNeil told him the company was an old company of high financial standing and that the men representing it were well and favorably known on the West Coast. He stated he was told that the machine was protected by patents and patents pending. He stated there was some discusison of a competing company but that there would be no trouble with it as it was so much inferior to Direct-U-Systems. He testified he signed an agreement October 6, 1939, and gave Mr. MacNeil $1500.00. [R. 197, Government's Exhibit 72.]

The letter, which is the basis of substantive Count 3 of the indictment was written November 9, 1939, to Mr. McReynolds and signed by Talbott. As heretofore urged, we respectfully submit that this letter could not be in furtherance of any scheme to defraud because it was written and mailed after the alleged object of the scheme was accomplished, *i. e.* obtaining of money from the intended victims, since it appears from Mr. McReynold's testimony that he paid his money on October 9, 1939. [R. 197.]

Apart from this, the witness testified he demanded the return of his money but never received it. However, he testified that he did not order an electric board for installation. He further testified that it was true that the or-

ganization (the company) did attempt to secure leases from hoels, that it assisted in securing three salesmen and assisted at meetings in training and forming sales organizations; that it assisted in compiling adequate lists of prospects and that it was true he, Mr. McReynolds, wrote, "to express my deep appreciation of the very fine assistance given me by Mr. MacNeil, a man of high attainments, exceptional personality and loyalty and trustworthiness . . .", and had signed the statement that he received all the assistance he was supposed to receive. [R. 208.]

On cross-examination the witness testified he was an attorney admitted to practice in the states of California, Arizona and New York, that his work was mostly civil and corporation work, that he had been in active practice since 1901.

There is considerable additional correspondence contained in the exhibits, and we wish to refer to portions of Government's Exhibit 73. This is a letter dated December 8, 1939, from McReynolds to Talbott. It reads in part, "When I first met Mr. MacNeill here in Washington he told me that he did not know whether or not he had anything to offer me, and would take a day or two to look into the situation here. A day or two later he informed me that apparently the Robot-Map people had signed up but the one hotel—the Raleigh—and while they might be at work, it would seem that we had a good expectation of getting into this market with the electric Directory of the Direct-U-Systems." [R. 382.] From the same exhibit, ". . . I did not get any actual contact with the Robot-Map people until we started on the Willard (hotel) and after we had started . . . two of the Robot-Map salesmen came to my office to talk to me and

get some information . . . we went over the situation, with nothing to conceal, and they admitted frankly that on the basis of $60.00 a year we had much more to offer than they had, even at the same price; in fact, they hinted that they wanted a job with me. . . ." [R. 388.]

In this same exhibit this experienced attorney then made a proposal for a modification of the agreement. [R. 391-395.]

Further on in the same exhibit the witness stated that he wrote, *"It is all right for you and me to believe implicitly that the electric Directory of Direct-U-Systems is superior to anything else. . . ."* [R. 395.] (Italics ours.)

From the foregoing, we respectfully submit that the Court erred in not granting the motion of defendant for directed verdict at the close of the Government's case, and again when it was renewed at the conclusion of the evidence, for the reason that it is apparent there is no substantial evidence to support the allegations of the indictment, but, on the contrary, it appears from the excerpt of Exhibit 73, just quoted, in a letter written over a month after the witness signed the contract, had thoroughly investigated and experimented with the proposition, that an experienced attorney with thirty-eight years experience in civil and corporation law, implicitly believed that Direct-U-Systems was superior to any other product. [R. 395.]

We respectfully submit that this statement of Mr. McReynolds is an endorsement of the entire good faith of the defendant Marshall, that it demonstrates the failures and dissatisfaction of the franchise holders were not due to the defendant but were due to causes outside of his

control, as, for example, ill health on the part of Bergen, half-hearted efforts on the part of Schutt (as we have seen he only tried to sell advertising for one week) and endeavors to obtain the return of their money by others before they had ordered a machine which they were entitled to receive. It is apparent throughout this record that the defendant and his associates worked hard; that they delivered the machines when ordered; that in the case of Weeks the first machine was a rush job and they replaced it without cost, that the others worked and, as he testified and to which we have heretofore referred, the later machines were much more satisfactory; that the agents carried out the provisions of the agreement calling for assisting the franchise holders in obtaining hotels, assisting in the selection and training of salesmen and setting up of sales organizations; and, as we have seen and it affirmatively appears intermittently throughout the record, franchise holders signed acknowledgments that they had received everything the company had agreed to give them.

12. Ira H. Arnold (Patent Office witness). Mr. Arnold testified that he found no patent issued under anyone named Norman H. Marshall or to the defendants Marshall, Talbott, Martinez, Kane or Young or Marsh; nor did he find any assignment of National Directory Systems nor for the Automatic Map Company. He testified to an application for a patent by one Emmet W. McKenna on September 6, 1935, which was rejected the same year. [R. 211-212.]

13. Arthur K. Barnes. [Count 9, R. 44.] Mr. Barnes testified that in October, 1940, he was living in Pasadena and during the year met the defendant Marshall

with other defendants. He testified to a conversation with Marshall and asked if he could investigate the San Francisco situation by talking to the men who had sold space in the Sir Francis Drake Hotel and Marshall told him that that had been done by him, Marshall. He stated he requested a sworn list of the various hotels and locations where boards were in operation, which was furnished to him. [Exhibit 74 dated October 23, 1940; R. 213-216.] The witness testified that he gave the company a check for $1500.00 to cover the franchise for the territory agreed upon, that he received salesman kits and advertising matter. However, the witness testified that he took "some little time to investigate this proposition and three weeks elapsed during my investigation and I submitted the proposed contract to an attorney." [R. 217.]

The witness further testified he had had advertising agency experience in the East. In addition, that he obtained a Dunn & Bradstreet report through the bank, concerning which report he made no complaint to anyone although he states, "I was not satisfied with my report but I did get a report that was satisfactory to me. At least I was satisfied to the extent I was willing to take a chance." He testified that defendant Marsh agreed to help him get started, which he did. He testified that he didn't attempt to verify or check a sworn statement given him concerning hotels where cabinets had been installed. [R. 218.]

The agreement entered into between the company and Barnes was on the 22nd day of October, 1940, on which day he paid $1500.00. The letter in Count 9 is dated November 6, 1940, and was subsequent to the date the objective of the scheme, as alleged in the indictment, was accomplished. We therefore respectfully submit that this

letter is in no way, nor can it be considered in furtherance of the scheme charged in the indictment. Apart from that, an examination of the letter certainly shows that it cannot be in any way in furtherance of any scheme to defraud as it includes such statements that the company wishes to take this opportunity to assure Barnes that the success of his territory is of prime interest to them, as it is only through his success they can profit. [R. 45.] And again, the letter recites, "You and each of our lessees are the proprietors of an independent business . . . and you will profit exactly in the same proportion. . . . We are confident that Mr. Marsh explained each portion of our agreement with you, but if there is any point or provision that is not thoroughly understood by you, please do not hesitate to write us immediately, so that we may clarify it." [R. 46-47.]

Since the record is silent on this point, we may assume that from Mr. Barnes' investigation and the Dunn & Bradstreet report he received and from the advice given him by his attorney, he was satisfied with the enterprise outlined to him and that there was nothing in the contract which he did not understand. Moreover, as he testified, Mr. Marsh helped him get started as he agreed to do. [R. 218.]

It is true the witness testified that he asked for a return of his money from Mr. Talbott, which he did not receive, but was tendered a re-purchase agreement. [R. 217.] From the record the witness apparently did not carry out the provisions of the contract calling upon the lessee to furnish necessary information and requesting him to advise when he wanted the cabinets delivered. From the reading of that agreement, it is apparent there is nothing in the agreement which states that the money

will be returned, but, on the contrary, it is accepted as advance rentals.

Therefore we respectfully submit that defendant's motion for directed verdict at the close of the Government's case which was again renewed at the conclusion of the evidence should have been granted for the following reasons: 1. That the letter charged to have been mailed in furtherance of the scheme was mailed after the scheme alleged had been accomplished and therefore could not be in furtherance thereof, and 2. the evidence is insufficient to show that money was obtained under the circumstances charged in the indictment.

14. N. N. Edwards (Government Agent). Mr. Edwards, Postal Inspector, testified to conversations with various defendants in connection with this investigation. An excerpt from his testimony includes that Mr. Talbott told him that "There is no profit to us on advance rentals. We must have the advertising royalties to make any money on these deals." [R. 222.]

He testified that in a conversation with Mr. Marshall he asked how much money was invested in the business and he said that possibly $25,000 would take care of it. He further testified that Marshall told him instead of receiving a salary he received a commission of 5% from everything from franchise holders, including rentals that might be due.

He testified he inquired of Marshall concerning the patents and Marshall stated an effort was made to patent the board but it had not been granted. Marshall stated the rotator was patented about a year prior and was patented through an attorney whose name he thought was Coleman. [R. 230-231.]

These are the significant portions of Edwards' testimony which we desire to call the Court's attention to in support of our contention of insufficiency of the evidence.

We have looked diligently through the record and we cannot find where there is any contradiction of the statements attributed to Mr. Talbott or Marshall by the witness. Mr. Marshall's statement concerning the patents, while at first, seem to be in conflict with the patent official's testimony, on closer examination is not inconsistent. We may assume that if the Government could have disproved that $25,000.00 was invested in the company, if it could have disproved that Mr. Marshall received more than 5% of monies received from franchise holders, they would have done so. Thus, we find from the record no evidence to support the allegations of the indictment that it was the intention of the defendant Marshall to obtain money from the persons intended to be defrauded and convert it to their (his) own use; nor is there sufficient evidence to support the allegation that they had obtained this money without giving anything of value, nor anything of an equivalent value.

Count 11, Conspiracy—As we heretofore stated, Count 11 alleges conspiracy to commit the substantive offenses charged in the indictment. [R. 52-56.] We concede that there is evidence to support one or more of the overt acts charged in the conspiracy, leaving, therefore, the sole proposition as to whether or not there was a scheme, and if so, a conspiracy to commit the scheme charged.

We rest our presentation on this count on the arguments directed to the substantive counts because if there is insufficient evidence to support the allegations of the indictment that the defendants devised the scheme charged,

then this conspiracy count must collapse since it is dependent upon the existence of the scheme alleged in Count 1.

The Government rested at the conclusion of Mr. Edwards' testimony. [R. 238.] Whereupon, defendant, through his counsel, made a motion for dismissal and for directed verdict, which was denied and exception made. [R. 238.]

B. Defense. The defendant's case, which we do not propose to go into in this opening brief, consisted of the testimony of himself [R. 261-290] and this testimony included the introduction of Defendant's Exhibit 3X, which is described as a sales manual. [R. 264-287.] This exhibit is worthy of the Court's attention because it negatives allegations of the indictment that this was a scheme whereby defendant sought to obtain money under representations knowing the same to be false. A casual reading of the exhibit shows that it is a careful thought out sales brochure composed for the franchise holders and their salesmen, which were sent to all franchise holders. [R. 263.] The composition and mailing of a document of this character, we respectfully submit, indicates the sincere belief of the defendant Marshall in the soundness of the proposition they were selling. The defendant Marshall's testimony, other than for the exhibit, is taken up, for the most part, with denials. It is true that we find therein admissions that he signed Talbott's name to a large amount of the literature that went out, but that this was done with Talbott's permission. We respectfully submit this in itself does not tend to prove or disprove any of the material issues of the indictment.

Conclusion.

Summarizing, we respectfully urge that the Honorable Trial Court erred in not granting defendant's motion for directed verdict on Counts 1, 2, 3, 4, 5, 8, 9, 10 and 11 at the conclusion of the Government's case, to which an exception was noted. [R. 238.] And again for failing to grant the same motion when it was renewed at the close of all the evidence [R. 292], for the following reasons:

1. The evidence was insufficient to support the scheme charged in the indictment for there is no substantial evidence to establish the gist of the scheme charged in the indictment, *i. e.* that the defendants knowingly, wilfully and unlawfully devised and intended to devise a scheme to deprive persons alleged to be defrauded of money and property without them intending to give them anything of value, or anything of equivalent value.

2. That there is no substantial evidence to show that any of the fraudulent representations charged were knowingly made prior to the obtaining of the money from the persons named in the indictment, at least that could be chargeable to appellant.

3. That there is no substantial evidence to show that the defendants converted the money obtained for their own use; but, on the contrary, the record affirmatively shows that the defendants carried out the terms of their agreement, and that in all cases cabinets were furnished where they were requested under the terms of the contract by the lessees.

4. The evidence affirmatively shows the good faith of the defendants. Particularly, reference is again called to the testimony of the witness Weeks, where the first cabinet was replaced without any cost to him and it ap-

peared from his testimony that the machines subsequently delivered operated more satisfactorily than the first one.

5. The testimony affirmatively shows that defendants obtained, trained and instructed salesmen for the franchise holders, assisted them in obtaining leases on hotels. All of which testimony completely negatives the scheme charged in the indictment that the sole object of the defendants was to obtain the money and property of the people named without attempting or intending to give anything of value, or anything of equivalent value.

Wherefore, we respectfully submit and urge that the conviction of the defendant Marshall should be reversed on all counts.

Respectfully submitted,

JOHN J. IRWIN,

Attorney for Appellant.

No. 10,298.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN H. MARSHALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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1 2 3 4 5 8 9 10 — Use of mails.

11 — Conspiracy to defraud.

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3 years on 1 and 2, 2 on 11 — these concurrently.

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3 4 5 8 9 10 . suspended, 5 yrs probation starting at ~~end~~ expiration of sentences on 1, 2, 11.

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No. 10,298.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN H. MARSHALL,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Basis of Jurisdiction.

Appellant's opening brief accurately sets forth the statement of basis of jurisdiction and reference is made thereto.

Statement of the Case.

The appellant, Norman H. Marshall, and three other defendants on trial were convicted and pursuant to which judgment was entered against the appellant. The indictment charge the appellant and the defendants, Helen May Fawkes, Llewellyn F. Marsh, Albert A. Martinez and Charles W. Talbott, with having devised and intended to devise a scheme and artifice to defraud and with having obtained money and property from certain persons named in the indictment and other persons to the grand

jurors unknown, and from members of the general public who answered advertisements inserted in various newspapers and other publications who had signed letters bearing their names and addresses, by means of false and fraudulent pretenses, representations and statements, which said scheme and artifice was in substance as follows, to-wit:

Defendants would insert and cause to be inserted in the classified columns of newspapers throughout the United States, advertisements for resident managers in various localities, stating therein that the business connection would be permanent, that the income would reasonably be $6500 and more yearly, and that a cash deposit in varying amounts ranging from $1500 to $3750 was required and would be secured and returnable;

The defendants under the name of Direct-U-Systems would mail letters to the persons intended to be defrauded, who had responded to the advertisements and acknowledge receipt of the reply and state that a representative would call to explain the proposition in person, that the proposition was not a promotional matter, that the company had nothing to sell, that it was desired to select a person interested in a permanent connection which increases yearly, and that the company must virtually guarantee the success of the person to be selected; that the Direct-U-System was a corporation organized under the laws of the State of California, was a company of good reputation, of high integrity, of unlimited credit standing, and the exclusive manufacturers of electrical directories for display in lobbies of hotels; that the company was in a position to give permanent, lucrative and noncompetitive employment to persons who would agree to become franchise holders and distributors of said directories in a given

territory and who would pay sums of money to the company as advance rentals on a specified number of said electrical directories; that earnings of $6500 and more per year were being made the franchise holders holding franchises from the Direct-U-Systems;

That the business of Direct-U-Systems was international in scope, that the company had a long record for successful operation and was in a position to render satisfactory and continuous services;

That the directories of the Direct-U-Systems were unique and the first and only advertising medium of its kind to be on the market;

That the directories of Direct-U-Systems were in great demand by hotels and business men, and that space for installation of the boards in the lobbies of the hotels and subscriptions for advertising thereon were readily obtainable;

That the directories of Direct-U-Systems were protected by patents and patents pending;

That the directories of Direct-U-Systems would be shipped to franchise holders promptly upon order.

The indictment charged that each and all of said representations, pretenses and promises were false and known to be false and were made to persons intended to be defrauded as a part of said scheme and artifice to defraud; that said representations, pretenses and promises were made by means of certain oral statements, writings and papers so worded, constructed and expressed as to deceive, and were then and there intended to deceive said persons intended to be defrauded, and any person or persons who might hear or receive them, and that in execution of the scheme the mails were used.

Count eleven charges that the defendants did knowingly, wilfully, unlawfully, corruptly, fraudulently and feloniously conspire, combine, confederate and agree among themselves and with each other to commit certain offenses against the United States, that is to say, to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from those persons named and described in count one of the indictment as the persons intended to be defrauded, and for the purpose of executing such scheme and artifice to place and cause to be placed in the Post Office establishment of the United States letters, circulars, advertisements, newspapers, bulletins and other mail matter addressed to various and sundry persons;

The scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises which said defendants so conspired to devise and execute was set forth with particularity in the first count of the indictment and realleged and reincorporated in the eleventh count of the indictment as if again set forth at length; for the indictment in full see R. 2-56.

Statement of Facts.

The appellant and defendants Llewelyn F. Marsh, Albert A. Martinez and Charles W. Talbott in the summer of 1938 organized and caused to be organized a corporation known as Direct-U-Systems. Prior to the organization of Direct-U-Systems, the appellant and the defendants had operated from 1935 to the spring of 1938 under the name of National Directory Systems. In that venture they had offered for sale to various persons at numerous

places in the United States franchises covering definite territory to use and display electrical hotel directories as an advertising device, which said device was very similar in appearance and operation to the device used by Direct-U-Systems, as shown by Defendant's Exhibit ZZ [R. 480]. In that venture the National Directory Systems had received an appreciable amount of money in the sale of franchises, but no profits had been received by any of the purchases as of the franchises and the venture failed. Shortly after the appellant and his associates withdrew from the National Directory Systems, they organized the Direct-U-Systems and operated the business upon the same plan which had been used by the National Directory Systems, and sold and collected from a large number of persons, including those named in the indictment, a sum of money amounting to many thousands of dollars;

The appellant and his co-defendants placed and caused to be placed in numerous newspapers throughout the country advertisements intended to interest persons to whom franchises for the use of electrical hotel directories might be sold. Upon receipt of a reply from such advertisements, it was the practice of appellant and his co-defendants to acknowledge receipt of such replies, in which acknowledgment the persons would be informed that the nature of the business was such as to require personal contact, and that a representative of the company would in due course call upon the prospective purchaser and would inform him of the nature of the business, and all of the details connected therewith. Thereafter, a person representing himself to be an agent of Direct-U-Systems would call upon the prospective purchaser and by oral statements would represent and pretend that the Direct-

U-Systems was a corporation organized under the laws of the State of California; that it was a company of good reputation and high integrity, of unlimited credit standing and the exclusive manufacturers of electrical directories for display in the lobbies of hotels; that the company was in a position to give permanent, lucrative and noncompetitive employment to persons who would agree to become franchise holders and distributors of the said directories in given territories, who would pay sums of money to the company as advance rentals on a specified number of directories; that a person who would become a franchise holder would be given the exclusive right to install directories in his territory and to sell advertising space to business concerns thereon at certain stipulated weekly, monthly or yearly rates, and to keep all the money so derived except a certain percentage which was to be remitted to the company as royalty, as his own, and that large earnings pyramiding as the number of boards increased would be earned thereby by the franchise holder; that earnings of $6500 and more per year were being made by franchise holders and would be made by others who would take franchises from Direct-U-Systems;

That the business of the company was international in scope and that the company had a long record of successful operation and was in a position to render satisfactory and continuous service;

That the directories of Direct-U-Systems were unique and the first and only advertising medium of this kind to be on the market; that the directories of Direct-U-Systems were in great demand and subscriptions for advertising thereon were readily obtainable;

That the directories were protected by patents and patents pending and that franchise holders would be with-

out any competition in distributing the said directories and selling advertising space thereon;

That the directories of Direct-U-Systems would be substantially constructed and free from defects and mechanical errors and would render steady and dependable service and would be shipped to franchise holders promptly upon order;

That the Direct-U-Systems would maintain and service the directories shipped to the franchise holders and would at all times keep said directories in good working order and mechanical condition;

As a result of said representations by the appellant and his co-defendants and their agents, Harold E. Weeks of New York City, New York; Ralph H. Bergen of Richmond, California; Ralph A. Burke of Oakland, California; Cecil I. McReynolds of Washington, D. C.; E. M. Schutt of Cleveland, Ohio, and L. C. Whitney of Alameda, California, responded to advertisements in newspapers and each purchased franchises and are the persons alleged to have been defrauded in the respective counts in the indictment. No royalties were ever paid by any of the purchasers to the company and no profit was had by any of them;

Each of the letters set forth in the respective counts in the indictment were admitted mailed by the defendants and each of the defendants had knowledge of the method of the business and the fact that the mails were being used to conduct the business; likewise each of the defendants actually engaged in the business. The appellant was actually engaged in the business from its inception to and including the date of the filing of the indictment;

Each of the purchasers named in the various counts in the indictment, after they had been approached by the

appellant, his co-defendants, or his agents, executed with the company an agreement, which set forth among other things respective amounts that the respective victims paid or agreed to pay as lease rental for the first twelve months of the contract; and further that the lessor, Direct-U-Systems, was to receive from the lessee, the purchaser, a 20% royalty in addition to the lease rental above mentioned; and further in addition to the lease rental and royalty, the lessee, the purchaser, was obligated to pay to the lessor the further sum of 50c for each advertising card furnished for the lessee's subscribers each month;

None of the mechanical devices delivered to the respective purchasers operated satisfactorily, nor were the devices delivered promptly as it had been represented they would be; some were never delivered.

Purchasers of the franchises were unable to dispose of the advertising space provided by the device, and of the contracts obtained for advertising space in such device, the major part were cancelled by the advertisers either because of the inability of the purchasers to obtain and put into operation the directories, or the failure of mechanical operation of the directories after they had been installed.

Of those directories actually delivered, none operated successfully and necessary parts and repairs for the successful operation of the device were either not furnished at all or with such delay on the part of the appellant and his associates as to make it impossible for the purchasers

to procure and maintain the advertising service to their clients;

Each of the purchasers were obliged to and did carry on extensive correspondence with the appellant and his co-defendants with respect to the faulty operation of the directories or with the view of being reimbursed for the funds advanced by them under the terms of their respective franchise agreements. As a result of such correspondence each of the purchasers of the franchise agreements, as set forth in the respective counts in the indictment, was offered by the appellant and his co-defendants a document or settlement agreement purporting to be a re-purchase agreement by the terms of which the territory which had been assigned to the respective purchaser was to be resold to other persons by the defendants, and the original purchaser was to be reimbursed out of profits to be earned by the new purchaser.

In some instances these re-purchase agreements were accepted and in other instancs, refused; but in no instance did any of the purchasers ever receive a full return of his investment and in no instance did any of the purchasers of the franchise agreements receive or in any manner obtain any profits or pay to the defendants any royalty.

Questions Presented by the Appeal.

The sole question presented on this record for consideration by this Honorable Court is the sufficiency of the evidence.

ARGUMENT.

I.

The Allegations Contained in the Indictment Are Sufficient to and Do Properly Charge the Violation of the Mail Fraud and Conspiracy Statutes.

The appellant contends at page 10 of his opening brief, "We take the position that the remaining allegations of the indictment commencing with 'That thereafter,' the defendants would contact the persons to be defrauded and by oral statements, etc., would represent and pretend, is, by the language of the indictment, surplusage." [R. 5.] Obviously this contention is based upon the wording of that part of the indictment beginning with the words "That thereafter" [R. 5]. A reasonable and fair construction of the allegations contained in the indictment readily refute appellant's contention, since allegations as to certain representations made by the appellant and his co-defendant which are found in the indictment after the use of the wording in question, clearly show that such representations were made to the respective victims as inducements to cause them to part with their money and before any of them had parted with money. The evidence is uncontradicted that all of the representations appearing in the indictment after the words in question were made by appellant, his co-defendants, or agents, to the purchasers at a time when they were yet prospective purchasers and for the express purpose of inducing them to part with their money. Therefore, the most that may be said is that there appears to be a misarrangement in form and order of the allegations.

Where there is a misarrangement in form and order of the allegations of an indictment not prejudicing the defend-

ant, although subject to criticism, there is no ground for reversal.

Cowl v. United States, 35 F. (2d) 794 (C. C. A. 8).

We quote from page 797:

> "While the indictment here under consideration is cumbersome, lacking in clarity, intertwining statements of the scheme to defraud with methods employed, we do not think it should be held defective on the ground of duplicity, granting that such question was preserved in the record. It sets forth but one general scheme to defraud. The indictment charges that by means 'hereinafter described' the victims were to be induced to give up their money. Some of the matters which counsel urge as merely recitals were in fact tied up to and a part of the scheme to defraud, though not set forth where the attempt is made to describe the same."

Surplusage consists of allegations of matter wholly foreign and impertinent to the cause, unnecessary averments, or allegations without which the pleading would yet be adequate. Words adequately charging the distinct offense cannot be rejected as surplusage.

Goldstein v. United States, 63 F. (2d) 609.

Quoting from page 612:

> "Surplusage in an indictment consists of allegations of matter wholly foreign and impertinent to the cause, unnecessary averments, or allegations without which the pleading would yet be adequate * * *
>
> "Mere surplusage in an indictment may be disregarded, and in a case such as this, where a number of false representations are alleged tending to estab-

> lish the existence of the scheme, it is not necessary for the government to prove all of the false representations charged if proof of a lesser number lays a sufficient foundation for a finding by the jury that the scheme was in fact devised."

See, also:

Creel v. United States, 21 F. (2d) 690.

Again in:

Stumbo v. United States, 90 F. (2d) 828,

in discussing the adequacy of pleading, the court had to say at page 831 of the opinion:

> "The question we have to decide is not whether the present indictment is a model pleading, or whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, so that the judgment may be a bar to further proceedings against him for the same offense."

Where words are employed in an indictment which are descriptive of the identity of that which is legally essential to the charge in the indictment, such words cannot be stricken out as surplusage.

Butler v. United States, 20 F. (2d) 570.

We, therefore, respectfully submit that when proper consideration is given the language of the indictment, as well as the evidence proffered by the Government before closing its case, the contention of the appellant is without merit.

II.

The Evidence Presented by the Government Was Sufficient to Put the Appellant to His Defense.

It is fundamental that the trial court will exercise its discretion as to whether or not the Government has made out a *prima facie* case, and if it so determines, the defendant may be put to his defense. The evidence presented by the Government and especially the stipulated facts that the count letters in question set forth in the substantive counts were mailed by appellant and his co-defendants to the respective persons named in each of the substantive counts, and the sales made to and money received from the respective purchaser, left no alternative to the appellant save to defend upon the ground that he acted in good faith. Therefore, the trial court had ample justification for the denial of appellant's motion to dismiss at the close of the Government's case.

III.

The Evidence Was Sufficient to Sustain and Justify the Conviction on Any One of the Nine Counts in the Indictment.

At the outset it will be well to discuss briefly the nature of the business of the appellant and its origin. In the summer of 1938 the appellant and his co-defendants organized a corporation known as Direct-U-Systems. It was proposed to manufacture and lease out to various and sundry persons a mechanical device in the form of a cabinet, which was to be used in the lobbies of hotels to the end that guests of the hotel might readily be directed to the name and locality, in the particular city where the hotel was located, of different business and professional enterprises which the guests might have

need of. It was the avowed purpose to so construct and finish the mechanical device so as to blend in with the surroundings in which it was to be placed. The appearance of the proposed cabinet was similar to defendant's Exhibit ZZ [R. 480]. As will be noted the upper part of the cabinet was to contain a map of the city in which the hotel was located. On either side of the cabinet, provision was made for the insertion of various types of advertisements. In the center of the machine and beneath the map, there was to be a rotating device which went in operation automatically and changed cards upon which advertisements appeared. Electrical equipment was to be furnished so that in the operation of the machine an electric button was placed opposite each advertisement, which when pressed would cause a red light to appear on the city map showing the location of the hotel where the machine was located and a white light more or less in the location where the particular place of business might be found. In other words, if a guest desired to purchase a pair of shoes, he would press the electric button opposite the name of a shoe merchant, then look at the map and ascertain the approximate locality of the shoe merchant.

The machines in question were the property of Direct-U-Systems and were leased to various and sundry persons for use in a specified territory. The term of the lease was to be determined by the parties at the time the lease agreement was entered into. In some instances it was three years, and in others as much as five years. Upon signing a lease contract the purchaser was obliged to pay in cash a stipulated amount per year for each cabinet to be used by him in his territory. Hotel sites for the use of the machine in a territory were to be procured

by Direct-U-Systems, and the cabinets then built and finished to comport with the interior finish of the particular hotel. The cabinets made provision for forty or fifty advertising spaces. This space was to be sold by the lessee, the sales to be reported to the company, and later the cabinets were to be delivered equipped with all of the advertising spaces and printed matter necessary therefor intact. The lessee was to retain the funds received for the sale of advertisements, less 20% which was denominated as a royalty in addition to the lease rental and payable to the company upon installation and collection. In addition the company was to receive 50¢ for each advertising card furnished for the lessee's subscribers each month. For the convenience of the court, it may be said that each of the purchasers named in the substantive counts in the indictment with the exception of Cecil I. McReynolds, executed an agreement of the nature and kind above described, a copy of which is contained in Government's Exhibit No. 4 [R. 78], which, as will be noted, was an agreement entered into with Harold E. Weeks. In this connection it should be borne in mind that the first lease contract with which the indictment is concerned was made in August of 1938, and the last in November of 1940, with intermittent sales to other parties named in the indictment.

The plan of operation was derived from the experience of the appellant and his co-defendants in a previous venture, known and operated as National Directory System, a corporation, whose business was identical with that of Direct-U-Systems. The appellant had owned or controlled at least 70% of the capital stock of the National Directory System, and had sold this stock to one Ralph Young [R. 74 and 75]. After this sale, and with knowl-

edge that the National Directory System had been a failure, the appellant and his co-defendants then incorporated Direct-U-Systems and began the operations complained of in the indictment.

The offense defined by Title 18, Section 338, United States Code, commonly known as the mail fraud statute, calls for the presence of two essential elements (1) the existence of some scheme or artifice to defraud; and (2) the placing or causing to be placed in the Post Office letters, bulletins, etc., for the purpose of executing or attempting to execute the scheme. Whether such a scheme was formed may be established by facts and circumstances and the reasonable inferences and deductions which fairly may be drawn from them.

> *Pietch v. United States,* 110 F. (2d) 817 (C. C. A. 10).

In the case of *Durland v. United States,* 161 U. S. 306, which was decided in 1895, and which is cited in numerous subsequent mail fraud cases, the court points out at page 313:

> "It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments * * * any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.
>
> "In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present *or suggestions or promises as to the future.* The significant fact is the intent and purpose." (Italics ours.)

Therefore, the significant fact in cases of this nature is the intent and purpose behind the scheme. In the case

of *Weiss v. United States,* 122 F. (2d) 675, c. d. 314 U. S. 697, the court had before it the violation of the mail fraud statute. The opinion reviews numerous authorities and the question of intent to defraud was discussed at great length.

> "The intention to devise a scheme to defraud necessarily precedes the formation of any such scheme, but the completion of the entire scheme is not necessary to a violation of the statute. An intention to devise a scheme to defraud or for obtaining money by false pretenses is sufficient if enough of the scheme is formed to constitute an offense and the mails are used for the purpose of executing or attempting to execute the part which is completed. * * *
>
> "The variety of means which may be employed in the execution thereof is limited only by the ingenuity of the schemer. The statute is violated if, having devised or intended to devise a scheme to defraud, the mails are used for the purpose of executing such a scheme, or attempting to do so. It is not necessary that where the artifice was devised the schemers shall have worked out all of the details of its execution. The law does not define fraud. It needs no definition; it is as old as falsehood and as versable as human ingenuity."

The use by the appellant and his co-defendants of means and methods already known to them to be unsound, valueless and unprofitable of itself is a strong inference of a scheme or plan to defraud. Representations to prospective purchasers of the Direct-U-Systems that the business was new and novel, and in effect had no competition, leaves no doubt that there was a scheme and artifice to defraud.

The appellant relies upon the proposition that a false representation does not amount to fraud unless there is specific fraudulent intent at the time the representation was made. With this we find no fault but no amount of honest belief that the enterprise would ultimately make money can justify or excuse false representations sent through the mails to obtain money for the enterprise.

Foshay v. United States, 68 F. (2d) 205 (C. C. A. 8);

Busch v. United States, 52 F. (2d) 79;

Linn v. United States, 234 F. 543;

Menefee v. United States, 236 F. 826;

Pandolfo v. United States, 286 F. 8.

We venture the assertion that if the appellant and his co-defendants had been entering upon any enterprise there might be some justification for the contention that they were acting in good faith. The facts are that they were not. They were continuing a plan or method of operation which they knew had been proved to be a failure. That fact, coupled with numerous other activities on the part of appellant and his co-defendants, leaves no basis for the contention that there was no specific fraudulent intent at the time the representations were made.

Appellant relies upon the contention that it is not enough that there be evidence of a scheme to defraud, but it must also be shown that the mails were used as a part of the scheme charged, and that each letter relied on was not sent out until after the scheme of fraud had been born. As regards the question of whether or not the mails were used as a part of the scheme charged, it is obvious, after an examination of the respective agreements

entered into, that the scheme or artifice of the appellant and his co-defendants was not limited to the procurement and acceptance of the original cash payment, but rather had for its objective the procurement of lease rentals. It should be noted that the rentals paid were for the first term and it was anticipated that rentals would be collected for subsequent years. Therefore, the scheme was a running or continuous plan. All of the letters set forth in the respective substantive counts were well within the period and were used as a part of the scheme charged. Certainly, all of the letters involved in the respective counts were sent out after the scheme was born and while it was still yet in operation. If, as suggested by appellant, the scheme had been accomplished when the first annual rentals had been received, it is difficult to understand the terms of the respective agreements made with the victims, which provided among other things for the construction and delivery of the advertising device after the money was received, and further to furnish service for such machine during the life of the agreement.

The appellant at pages 13 to 17, discusses the testimony of Harold E. Weeks, alleged to be a victim and subject of the alleged scheme to defraud in counts five and eight of the indictment. The agreement made with Mr. Weeks by Direct-U-Systems through its agent C. S. Wallace, Government's Exhibit No. 4 [R. pp. 78 to 84, incl.] provides that the agreement should remain in force for a period of three years and that the lease rental would be $750 per year for each machine containing 60 spaces for advertisements and $500 per year for each machine containing 40 spaces, and that the second and succeeding years would be at a lesser rate. The agreement was made on

the 27th day of July, 1939, and by its terms would not expire until July 27, 1942. The letters mentioned in the respective counts are well within that period. In all of the other counts the same situation is true except as to the respective duration of the different agreements. The appellant likewise contends that Mr. Weeks and each of the other alleged victims signed receipts at or shortly after the dates when they paid the respective sums of money; and it is the contention of the appellant that such receipts indicate no other or further obligation on the part of appellant and his co-defendants, when in truth and in fact each of the alleged victims were under agreement for a definite and fixed period of time, which agreement also required services and obligations on the part of appellant and his co-defendants. It is difficult indeed to appreciate the contention of the appellant, that the count letters in question were not used as a part of the scheme charged.

We submit that the representation that the alleged victims would, as others were doing, profit handsomely, was false and fraudulent and known to be false and fraudulent, since in truth and in fact no earnings at all were being made by any of the franchise holders, but on the contrary from the period beginning in August of 1938, to and through October of 1940, none of the alleged victims had received any earnings as the appellant well knew.

The respective purchasers were told that the directories of Direct-U-Systems were protected by patents and patents pending, and that the franchise holders would not have any competition in distributing said directories and selling advertising space thereon, whereas in truth and in fact the directories were not protected by patents and patents

pending. The testimony of Ira H. Arnold [R. 211-212] was that as Assistant Chief of the Application Division of the United States Patent Office, he had made a search of certain designated names of companies from January 1, 1922, to September 1, 1942, and did not find any patent issued under the name of Norman H. Marshall on a directory device, and that he did not find any issued to Charles W. Talbott, Albert Martinez, A. Kane, Ray Young nor L. F. Marsh.

The representation that for a consideration of an annual rental fee for each directory furnished, they would immediately supply as many devices as needed for placing in hotels and would install and maintain same at all times without cost or expense to the franchise holder, was false and fraudulent since such directories as were furnished were not received by the franchise holders promptly and when furnished were never placed in a condition so as to operate properly, as is disclosed by the testimony of the respective purchasers named in the various counts, as well as by purchasers not named in the counts.

The representation that the directories of the Direct-U-Systems were unique and the first and only advertising medium of this kind to be on the market was shown to be false, since, in the testimony of Ralph Young, T. E. Morgan, E. M. Schutt, Charles S. Wallace, H. R. Browne and C. I. McReynolds, it was definitely shown that other and different devices of a similar nature were competing with Direct-U-Systems.

The representation that the company was of good standing and financially able to carry out its agreements was definitely shown to be false by the witness Charles S. Wallace, who identified letters received by him from the ap-

pellant, excerpts of which appear in the record as part of Government's Exhibit No. 25 [R. 118 to 125, incl.].

The foregoing representations, as well as others not here mentioned, but which are contained in the record, we believe furnish ample justification for the action of the trial court in denying appellant's motion for a directed verdict at the close of the Government's case.

IV.

The Evidence Was Sufficient to Sustain the Conviction for Violation of the Conspiracy Statute.

The appellant contends that count eleven of the indictment which charges conspiracy must fall, since it is dependent upon the existence of the scheme as alleged in count one. The offense charged in count eleven was that appellant and his co-defendants had conspired, confederated and agreed among themselves and with each other to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations and promises. This court, in the case of *Marino v. United States,* 91 F. (2d) 692, defined conspiracy as:

> "A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

The same case determines that the gist of the offense is the confederation or combination of minds and that the crime is complete when an overt act is done by at least one of

the conspirators in furtherance of the conspiracy. The uncontradicted evidence in the case at bar is that the appellant and his co-defendants in the summer of 1938 agreed to and did engage in the business described in the indictment. The appellant and the defendant, Mr. Talbott, managed the office, and the other co-defendants and agents went abroad to consult with prospective purchasers who had answered advertisements. Each of the parties had knowledge of the nature of the business and the manner of its conduct. Each had knowledge that the business was similar in nature to a business they had theretofore engaged in, namely, the National Directory System, and that said last named business had not been profitable. The appellant had knowledge that he had sold his interest in the National Directory System to Ralph Young, who in turn organized another company in which the appellant had an interest, and that said last company referred to was engaged in the same type of business as was the appellant. Further, as late as October of 1940, the appellant and his co-defendants sold a franchise to Arthur K. Barnes, and among other things told Barnes that the machines in question were operating successfully in various hotels, when he, the appellant, knew, first, that there was not a directory operating successfully in any hotel, and second, that at that time the Direct-U-Systems was engaged in voluminous correspondence with Harold Weeks of New York relative to the unsatisfactory operation and unprofitable results of the machines which Mr. Weeks had tried to operate.

The record is replete with overt acts committed by the appellant and his co-defendants in furtherance of the conspiracy.

A conspiracy is a continuing offense as long as it is in progress of execution as manifested by overt acts to effect the purpose thereof.

Eldredge v. United States, C. C. A. 10, 62 F. (2d) 449;

Talman v. United States, C. C. A. 10, 67 F. (2d) 716;

Powe v. United States, C. C. A. 5, 11 F. (2d) 598.

Conspiracy being a partnership in criminal purposes, it is not essential that all of the conspirators join in an overt act, the act of one making the guilt of all complete.

Curtis v. United States, C. C. A. 10, 67 F. (2d) 943;

Williams v. United States, C. C. A. 6, 3 F. (2d) 933.

It is conceded by appellant that there is evidence to support one or more of the overt acts charged in the indictment. This concession, therefore, leaves the sole proposition as to whether or not there was a scheme, and if so, a conspiracy to commit the scheme charged.

Conclusion.

We respectfully urge that the trial court did not err in not granting defendant's motion for a directed verdict on counts one, two, three, four, five, eight, nine, ten and eleven at the conclusion of the Government's case; nor in refusing to grant the defendant's motion when it was renewed at the close of all the evidence. We respectfully submit that the evidence was sufficient (a) to put the defendants to their defense; (b) to submit the matter to the jury, and (c) to sustain the conviction, and we, therefore, urge that the conviction of the defendant Norman H. Marshall be sustained on all counts.

Respectfully submitted,

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APPENDIX.

Title 18, United States Code, Section 338:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Title 18, United States Code, Section 88:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."